Supreme Court, U.S.
FILED
JUN 8 1992
OFFICE OF THE CLERK

(5)

No. 91-1745

In The

Supreme Court of the United States

October Term, 1991

ELKS NATIONAL FOUNDATION, A LEGAL ENTITY, *et al.*,

Petitioners,

vs.

FRED J. WEBER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

		Page
Table of Citations		ii
Preface		1
I.	The Court Below, the Ninth Court of Appeals, Misconstrued the Case of *Robinson v. Ariyoshi,* 753 F.2d 468 (9th Cir. 1985).	1
II.	Title 28 U.S.C. § 1257(a) Is Not Decisive in this Case.	2
III.	There Is No Basis for Continental or the Lower Court to Claim that the McDonald Assignees Were Accorded Due Process of Law by the Montana Supreme Court.	4
IV.	The McDonald Assignees Are Not in a Class of ". . . Every Disappointed Litigant . . .".	4
V.	Failure to Apply for Writ of Certiorari to the Montana Supreme Court	5
VI.	There Has Been No Change in the Legal Position of the McDonald Assignees.	6
VII.	Continental Misunderstands the Position of the McDonald Assignees.	7
VIII.	Conflict of Interest	7
IX.	Other Authority Relied Upon by Continental	8

Contents

Page

X. Continental Does Not Have a Defense to Claim to the McDonald Assignees. 8

Conclusion 10

TABLE OF CITATIONS

Cases Cited:

D'Agostino v. Swanson, 784 P.2d 919 (MT 1990) 9

District Court of Columbia Court of Appeals v. Feldman, 460 U.S. 462 8

Mitchum v. Foster, 407 U.S. 225 (1972) 3

Prudential Insurance Company of America v. Cheek, 252 U.S. 567 6

Robinson v. Ariyoshi, 753 F.2d 468 (9th Cir. 1985), 477 U.S. 902 (1986) 1, 2, 3, 8, 10

Schlosser v. Hemphill, 198 U.S. 173 6

Uri v. Thompson, 337 U.S. 163 6

Statutes Cited:

28 U.S.C. § 1257(a) 2, 3

28 U.S.C. § 2283 3

42 U.S.C. § 1983 . . . . . 2, 3, 5, 10

PREFACE

Answer briefs to our petition for writ of certiorari have been filed by the respondent judges and justices (judges) and, separately, by Continental Oil Company and the rest of the defendants (Continental). This reply brief is in response to both of those answering briefs.

I. THE COURT BELOW, THE NINTH COURT OF APPEALS, MISCONSTRUED THE CASE OF *ROBINSON v. ARIYOSHI*, 753 F.2d 468 (9TH CIR. 1985).

At pages 16 and 17 of its brief Continental argues that the facts of this case are different from the *Robinson* case and quotes from the distinctions made by the court below.

In the *Robinson* case the Ninth Court of Appeals ruled that the failure of a state supreme court to consider United States constitutional rights in depriving a litigant of property without a hearing (without due process of law) was an adequate basis for a federal district court to enjoin the enforcement of the state court's ruling.

In this case the same Ninth Court of Appeals sought to distinguish the *Robinson* case on the grounds that the *Robinson* case ". . . overturned the existing state water rights system" while this case involved only ". . . well-polished rules of Montana law . . ." (App. 13).

This distinction is pointless. It is none of the federal court's business if the State of Hawaii changes its property laws by legislation, judicial decree or otherwise. It becomes the federal court business, the court in *Robinson* said, if the deprivation of property is affected by court decree and the court refuses to consider the constitutional implications of the taking. It was the

failure of the state supreme court to consider the constitutional implications of its depriving a litigant of property without a hearing that triggered federal court intervention under § 1983. The character and the amount of the property involved is immaterial. That the decree deprived of a litigant without due process of law is decisive.

The *Robinson* case is precisely in point on the principles involved. On appeal of *Robinson* to this Court the applicability of § 1983 was fully briefed and this Court did not rule the lower court to be mistaken on its reasoning with respect to § 1983 but reversed on other grounds. 477 U.S. 902.

The Court of Appeal's failure to follow its *Robinson* ruling is erroneous. Its refusal to set aside the sanctions that were imposed for relying upon that case and its imposition of further sanctions is both erroneous and unfair.

II. TITLE 28 U.S.C. § 1257(a) IS NOT DECISIVE IN THIS CASE.

Both the judges and Continental at page 13 of their briefs argue that the indicated code section is decisive of this case. This code section provides that final judgments of the highest court of the state ". . . may be reviewed by the Supreme Court by writ of certiorari . . .".

We do not believe the indicated statute forecloses us in this case. State "highest" courts can and, in this case, have, denied civil rights to persons protected under Title 42 § 1983. Section 1983 makes no exception for state appellate courts. We suggest it was not the intent of Congress in enacting § 1983 to leave an enclave of state officials who are entitled to disregard federally protected civil rights.

See the case of *Mitchum v. Foster*, 407 U.S. 225 (1972) where this Court held that even a federal statute prohibiting federal courts from enjoining state court proceedings must yield to a § 1983 suit in a proper case. This Court said:

> "Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial." Ex parte Virginia, 100 U.S. at 346, 25 L. Ed. 676. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a "suit in equity" as one of the means of redress. And this court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." (Citing cases.) at 242.

While this Court in *Mitchum* was considering § 1983 *vis-a-vis* the anti-injunction statute, Title 28 U.S.C. § 2283, the language used is appropriate to the case at bar.

The court in *Robinson v. Ariyoshi*, 753 F.2d (9th Cir. 1985), held that circumstances parallel to the case at bar constituted a proper case for federal court action under § 1983. Title 28 U.S.C. § 1257(a) was in effect when that ruling was made.

III. THERE IS NO BASIS FOR CONTINENTAL OR THE LOWER COURT TO CLAIM THAT THE McDONALD ASSIGNEES WERE ACCORDED DUE PROCESS OF LAW BY THE MONTANA SUPREME COURT.

At page 12 of its brief, Continental argues ". . . the Montana court heard, considered and even discussed the issues raised and arguments presented by the McDonald assignees, . . .". Variations of this statement are found throughout Continental's brief. The lower court's statement to the same effect is at p. 12 of the appendix. It is true that we weren't prevented from filing a brief in the Montana Supreme Court, not prevented from talking about our case and were not ejected from the courthouse.

However, it is clear that the Montana Supreme Court in plain language explicitly refused to consider any claims of the McDonald assignees other than the claims it had specified in its previous opinion when neither the McDonald assignees nor the letter documents upon which they rely were before the court. The Montana Supreme Court summarily reversed the lower court for giving consideration to anything other than the several previously specified defenses. To argue that the Montana Supreme Court did other than this is to simply refute that opinion (App. 123-135). To say that the Montana Supreme Court "considered" and "heard" the McDonald assignees' claims is belied by the opinion itself.

IV. THE McDONALD ASSIGNEES ARE NOT IN A CLASS OF ". . . EVERY DISAPPOINTED LITIGANT . . .".

On page 17 of its brief, Continental quotes from the lower court opinion, ". . . if McDonalds assignees were entitled to pursue their claim in federal court, every disappointed litigant in a property dispute would contend . . .".

We do not, we believe, fall into the class of ". . . every disappointed litigant . . .". We, clearly, were not granted a hearing on our claim. That we weren't appears from the opinion itself (App. 123-129). Also, we duly objected to such procedure relying on our rights under the federal constitution (Opening Brief, 15-28). Clearly the Montana Supreme Court did not consider our rights, and further, did not pass upon our constitutional objections. We would expect, and hope, that such a situation would be rare but when it does occur we would also expect a § 1983 claim to be heard by a federal court. The hearing of our claim would not open the gates of the federal courts to a flood of disappointed litigants.

V. FAILURE TO APPLY FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT.

Continental notes at page 12 of its brief that ". . . the McDonald Assignees did not appeal the Montana Court's decision to the United States Supreme Court." The Court of Appeals ruled the "McDonald's Assignees' sole avenue for redress in the federal system was a petition for *writ of certiorari* to the Supreme Court of the United States" (App. 13). Whether one has applied for writ of certiorari to the Supreme court is, strictly, irrelevant to the question of whether one has a claim under § 1983. However the reason we did not apply for a writ of certiorari to the Supreme Court of Montana is because the case has never been in a posture where such an application could be made. When the Montana Supreme Court issued its opinion in the case in which it refused to hear our claim it concluded in the following language:

> "We remand to the District Court for entry of judgment establishing the ownership of the working interest in the N½NW½ and for such further preceedings as are necessary and in conformity with this opinion" (App. 134). This

> opinion was handed down January 25, 1989. The lower Montana Court has never entered a final judgment. Of course the constitutional issues which we present in this application have never been finally decided by the Montana district court or considered at all by the Montana Supreme Court. In such a case the state court judgment is not 'final' as required by Title 28 U.S.C. § 1257(a) and an application for writ of certiorari would be premature."

See Uri v. Thompson, 337 U.S. 163; *Schlosser v. Hemphill*, 198 U.S. 173; *Prudential Insurance Company of America v. Cheek*, 252 U.S. 567.

VI. THERE HAS BEEN NO CHANGE IN THE LEGAL POSITION OF THE McDONALD ASSIGNEES.

The main thrust of the judge's brief is found at page 5 where they state "Petitioners have recast their claim in seeking a writ of certiorari." The brief goes on to accuse petitioners of claiming through the appeal to the Court of Appeals that the assignment given by Mr. McDonald was not ambiguous and claiming in this Court under a different theory, that the letter agreement between the McDonald Assignees and Continental Oil Company of 1964 was a "separate subsequent contract."

This statement in the judge's brief is totally inaccurate. *See* our opening brief to the Ninth Court of Appeals at page 7 where the letter agreement is set out verbatim and preceded by the statement:

> After the conclusion of H. W. McDonald's litigation against the McDonald & Eide, Inc., and on July 16, 1984, Continental wrote to H. W.

> McDonald's assignees and agreed with them precisely as to what had been conveyed by H. W. McDonald in the assignment in question.

This agreement was pled and relied upon in state and federal court [Complaint, (App. 161-163)]. The state district court made specific findings as to the existence, validity and conclusive effect of the agreement (App. 102, 111-112, 113). The fact of this conclusive agreement was amply pled and argued but was simply ignored by the Montana Supreme Court and the two federal courts. Had they "considered" or "weighed" it they could not have ruled as they did.

VII. CONTINENTAL MISUNDERSTANDS THE POSITION OF THE McDONALD ASSIGNEES.

At pages 20-21 in its brief Continental argues that ". . .due process guarantee does not ensure against judicial error . . .". We agree with this posit. Our case is not that the Montana Supreme Court erred but that it refused to give us a hearing. If it had, as we show herein, it could not have ruled as it did.

VIII. CONFLICT OF INTEREST

At page 10 of its brief Continental says: "Mr. Huntley has been overpaid as one of the McDonald Assignees and underpaid as one of the receivers assignees."

This is meant to imply that Gene Huntley, counsel herein for the McDonald Assignees, is representing conflicting interests. This implication is inaccurate. There are no claims for damages or for title by the McDonald Assignees against the "receiver's assignees". Neither is there a claim by Gene Huntley as one of the "receiver's assignees" for title or damage against the McDonald Assignees.

IX. OTHER AUTHORITY RELIED UPON BY CONTINENTAL

At page 14 of its brief Continental cites a number of cases for the proposition the United States District Court does not have power to review a judgment by the highest court of a state. None of these cases deal with the situation where the highest court has deprived a litigant of property without due process and refused to consider the constitutional implications of such taking. The only case that we have been able to find on this point is the one that we have cited and relied upon, *Robinson v. Ariyoshi* (which we have already discussed).

Continental also cites and quotes from *District Court of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (Appellant's Brief, 13-14). The lower court also felt that the *Feldman* case was significant and cited and quoted from it (App. 10). Actually in the case of *Robinson v. Ariyoshi*, the case upon which we reply, the *Feldman* case was carefully considered by the Court of Appeals and found not to be controlling (our Opening Brief, 43-54).

X. CONTINENTAL DOES NOT HAVE A DEFENSE TO CLAIM TO THE McDONALD ASSIGNEES.

Continental's defense to the title claims of the McDonald Assignees is that there was a mutual mistake about the quantity of ownership of Eide and Von De Linde when the 1964 letter contract was made and when that mistake was discovered in 1970 Continental was thereby authorized to claim from the McDonald Assignees the share of property it had lost, 1/8, in the suit againt it, Eide and Von De Linde by Gunnip (Continental, 5-6).

This defense to the McDonald Assignees claim does not hold water at all. First of all for the doctrine of mistake to be available

to a contracting party as a defense the mistake must be a mutual mistake.

Although Continental asserts that there was a mutual mistake as to the ownership of Eide and Von De Linde this assertion is not borne out by the evidence before the court. The document which Continental drew and relies upon for its claim of title in these preceedings [ratification and adoption of assignment by Mr. McDonald (App. 199-203)] recites at pp. 201-202 Mr. McDonald's claim that Eide and Von De Linde had no title to the property in question. Also, the party seeking relief on the ground of mistake must bring suit within 2 years under Montana law. *See D'Agostino v. Swanson*, 784 P.2d 919, 923 (MT 1990).

Continental, after discovering its so-called "mutual mistake" in December, 1970, didn't file a preceeding to rectify this mutual mistake within two years or at any time. The contract that Continental entered into with McDonald Assignees was and is binding and enforceable.

This law and circumstance seals beyond any doubt the question of whether the Montana Supreme Court "considered" or "weighed" the claims of the McDonald Assignees. No court could rule for Continental and deprive the McDonald Assignees of their property after giving even scanty consideration to the circumstances and law.

CONCLUSION

The ruling of the Ninth Court of Appeals in *Robinson v. Ariyoshi* is a logical answer to a civil rights law question which has never been answered by this Court, that is, does Title 42 § 1983, give a federal district court jurisdiction when a state supreme court deprives a litigant of property without due process of law (without a hearing) over objections to the taking based upon the United States Constitution? The appeals court in the *Robinson v. Ariyoshi* answered in the affirmative. We suggest the ruling in that case was a just one, in compliance with the intent and language of Title 42 § 1983. Had the Ninth Court of Appeals ruled otherwise in *Robinson v. Ariyoshi* there would be a hole in the fabric of federal civil rights law; there would be an enclave of powerful people whose activities would not be subject to civil rights scrutiny.

We feel also in this case that the fines imposed upon us by the lower courts in excess of $30,000 were cruel and ruinous. No matter how this Court decides the meaning of Title 42 § 1983 we ask these fines be lifted.

Respectfully submitted,

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